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U.S. Citizenship
and Immigration
Services

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FILE:

Office: SPOKANE, WASHINGTON Date:

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under § 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who entered the United States without inspection in June 1995. In 1996 the applicant was convicted of the offense of theft in the third degree, that is, theft of items valued at less than \$250, for which he was originally sentenced to 365 days in jail, with all but one day suspended. The judge later amended his sentence to 364 days, suspended. Thus, the applicant was found to be inadmissible to the United States under § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. He was also found inadmissible under § 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant is married to a U.S. citizen, has two U.S. citizen children, and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver under §§ 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)(v), in order to remain in the United States with his spouse and children.

The AAO notes that the district director also found the applicant inadmissible pursuant to § 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), because at his adjustment of status interview, the applicant failed to state that he had been charged with obstruction of law enforcement in addition to theft. In a memorandum regarding the applicant's appeal, the interim officer in charge writes that Citizenship and Immigration Services (CIS) amends its position that the applicant did not identify the existence of an arrest when his application was complete, but that CIS maintains that the applicant misrepresented a material fact in order to gain a benefit under the Act, in view of his failure to reveal the second charge stemming from his arrest for theft. The interim officer in charge emphasizes that there were two separate arraignments and findings of guilt on the two separate charges of theft and obstruction and law enforcement, implying that the charges were handled in two separate procedures which the applicant should have been able to distinguish.

On appeal, the applicant's wife writes that the applicant was unaware of the two separate charges, and she points out that the applicant provided information regarding his theft arrest at the time of his interview, indicating that he was not trying to misrepresent facts in order to gain an immigration benefit. The record reflects that the two charges were handled in the same court proceeding, on the same date, and there is no information regarding the participation of a legal representative on the applicant's behalf. The AAO finds the applicant's explanation on appeal reasonable; that is, that it was not apparent to him that he was found guilty of two separate charges stemming from the same incident, and that his admission that he was found guilty of theft denotes his intent to provide rather than withhold detrimental information.

The district director appears to have concluded that the applicant had established that extreme hardship would be imposed upon his qualifying relatives, but that the applicant did not warrant the exercise of discretion in his favor. The district director did not state explicitly that he had determined that extreme hardship was present in this case, but he conducted the discretionary balancing test as if extreme hardship had been found.

On appeal, the applicant points out that he was sentenced to 364 days, not 365 days in jail, apparently attempting to convince CIS that he did not commit an aggravated felony. The state of Washington

categorizes his crime as a “gross misdemeanor.” The AAO finds that, because the applicant was unlawfully present in the United States when he was convicted of the crime, he is not subject to the ban on waiver grants for permanent residents convicted of aggravated felonies. For the purposes of the instant waiver application, then, the crime is classified simply as a crime involving moral turpitude.

Section 212(a)(i) of the Act states in pertinent part, that:

(A)(i) Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, . . . is inadmissible.

Section 212(h) of the Act provides, in part, that: - The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . if –

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that –

- (i) the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien’s application for a visa, admission, or adjustment of status;
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and;
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse , parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien’s denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien’s applying or reapplying for a visa, for admission to the United States, or for adjustment of status No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Here, fewer than 15 years have elapsed since the applicant committed the theft; therefore, the applicant is ineligible for the waiver provided by § 212(h)(1)(A) of the Act. The question remains whether the applicant qualifies for a waiver under § 212(h)(1)(B) of the Act.

Furthermore, § 212(a)(9)(B) of the Act provides, in pertinent part, that:

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who –
- (II) Has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

- (v) Waiver. – The Attorney General [now Secretary, Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record contains documentation regarding the applicant's three-year-old daughter's medical condition. The documents indicate that the applicant's daughter is both physically and mentally disabled and requires a high degree of care and the participation of both parents. If the applicant is removed, his young daughter will lose his physical, emotional, and financial assistance, upon which she is dependent. The record also includes a declaration by the applicant's wife in which she wrote that caring for their daughter was a 24-hour a day job, requiring her to stay at home. She wrote that she could not leave her daughter with other caregivers, so, without the applicant's income, the applicant's wife would become dependent on public assistance. The AAO notes that the family's 2002 income tax return bears out this situation; of the total adjusted gross income of \$26,412, the applicant's wife earned only \$1188.32. Thus, if the applicant is removed, the entire physical, emotional, and financial burden of caring for their severely handicapped daughter will fall solely on the applicant's wife, causing her to suffer negative consequences beyond those which could be considered the common result of a family separation.

Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from inadmissibility under § 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member, including the alien's U.S. citizen children. A § 212(a)(9)(B)(v) waiver of the bar to admission resulting from § 212(a)(9)(B)(i)(II) of the Act requires a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. The latter waiver does not include the alien's children as qualifying family members. The key term in both of these provisions, however, is "extreme". Therefore, only in cases of great actual or prospective injury to the qualifying relative(s) will the bar be removed. Common results of the bar, such as separation or financial difficulties, in themselves, are insufficient to warrant approval of an application unless combined with much more extreme impacts. *Matter of Ngai*, 19 I&N Dec. 245 (Comm. 1984). "Extreme hardship" to an alien himself cannot be considered in determining eligibility for a section 212(h) waiver of inadmissibility. *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (Board) refers to *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), where the court stated that “extreme hardship” is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship.

The AAO notes that, according to the documentation submitted, the applicant’s wife must remain with their daughter, whether they choose to stay in the United States or travel to Mexico, due to their daughter’s need for close and constant care. The medical evidence on the record indicates that the applicant’s daughter’s severe physical and mental disabilities require ongoing, complex medical treatment which may not be readily available to her in Mexico. The applicant has established that his daughter and wife would suffer extreme hardship if they are obliged to move to Mexico. Based on the above factors, the applicant has also established that his daughter and wife would suffer extreme hardship if he were ordered removed from this country.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the Board held that establishing extreme hardship and eligibility for § 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case include the facts that the applicant entered the United States without authorization, and that he was convicted of a crime involving moral turpitude in 1996. The positive factors in this case include the facts that both the applicant’s wife and brain-damaged daughter would suffer extreme hardship if the applicant were removed from the United States or if they accompanied him to Mexico, since 1996 the applicant has had no further arrests or convictions, and the applicant is employed and supporting his family. The positive factors in this case outweigh the negative factors. The applicant has established eligibility for the §§ 212(h) and 212(a)(9)(B)(v) waivers of inadmissibility.

In proceedings for an application for waiver of grounds of inadmissibility under §§ 212(h) and 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.